

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

2 - - - - - X

3 :
4 BARBARA SCHWAB,

5 CV-04-1945

6 Plaintiff,

7 -against- :
8 PHILIP MORRIS, INC. ET AL.,

9 Defendant. :
10 August 312, 2005

11 - - - - - X 11:00 o'clock a.m.
12

13 TRANSCRIPT OF CIVIL CAUSE FOR STATUS
14 BEFORE THE HONORABLE JACK B. WEINSTEIN
15 UNITED STATES DISTRICT JUDGE

16 APPEARANCES:

17 For the Plaintiff: MICHAEL D. HAUSFELD, ESQ.
18 ANDREA HERTZFELD, ESQ.

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20 For: Class Plaintiffs

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1 THE COURT: Good morning. 2 MR. GROSSMAN: This is Ted Grossman. 3 THE CLERK: We have not started as yet, sir. This is 4 civil cause for status conference: Schwab versus Philip 5 Morris, et al. 6 THE COURT: Good morning, everybody. Thank you, for 7 coming in and for those who are on the phone. I appreciate 8 that at the end of summer we all want to spend as much time 9 with our families or others and we are very grateful for your 10 time. 11 Do you have all the appearance? 12 All right. Was it the defendants who wanted this 13 conference? 14 MR. GROSSMAN: Yes. Thank you. This is 15 Ted Grossman. First of all, I appreciate very much your 16 courtesy and promptness in responding to my letter and the 17 same for Judge Gold. 18 THE COURT: He's right here. We are both here 19 together. 20 MR. GROSSMAN: I appreciate it very much and I do 21 want to thank you, very much. This case was set on a schedule 22 that had been agreed by the parties as worked out with Judge 23 Gold at the beginning of this year, and indeed, even before 24 the plaintiffs were to designate their witnesses their -- 25 expert witnesses -- they were to answer questions under	Page 3	Page 5

<p>1 another time, but you know, just about all of us are from a 2 tremendous amount of cigarette litigation. Those of us who 3 are participating on the phone or in person have been counsel 4 in Simon II and NAW, in Felice, in Blue Cross Blue Shield, in 5 fifteen or so cases. You have plaintiffs, you know, 6 plaintiffs' counsel from those cases and you and Judge Gold 7 have been able to work out in an amicable way and in a 8 professional way the schedules in those matters and although 9 those were highly adversarial proceedings, they were always 10 handled in a professional manner. Here we are confronting 11 something else. It's new in my experience in the cigarette 12 litigation in the Eastern District of New York. It's making 13 it extremely difficult to prepare this case in a manner that 14 even approaches reasonable economy, and whatever the 15 plaintiffs are representing in their current letter, and I 16 think that should be taken in the same spirit as what was 17 previously represented when, for example, they said to the 18 Court on May 26th they would have no additional experts, while 19 they had their experts conducting polls on which they would 20 later make their current submissions, that no matter what goes 21 on from here we need to be sure that we are not constantly 22 engaged in matters that are just going to go by the boards, 23 and that are wasteful.</p> <p>24 The plaintiffs unquestionably know that by 25 submitting nine extra experts and changing the basic nature of</p>	<p>Page 6</p> <p>1 we can argue the motion. We can go forward as it is, and we 2 are confident that on the motion briefed by the plaintiffs as 3 briefed by us we will win under the law.</p> <p>4 THE COURT: You are prepared, as I understand, to go 5 forward on September 12th?</p> <p>6 MR. GROSS: We were prepared to go forward on 7 September 12th on the original motion that was filed by the 8 plaintiffs and briefed by us.</p> <p>9 THE COURT: I understand but not -- excuse me --</p> <p>10 MR. GROSSMAN: Of course, it is not being modified 11 for purposes of that argument.</p> <p>12 THE COURT: You are prepared to go forward, as I 13 understand, on September 12th based on documents you received 14 but not on those recently proffered or to be proffered, 15 correct?</p> <p>16 MR. GROSSMAN: Yes.</p> <p>17 THE COURT: Not on those additional expert reports.</p> <p>18 MR. GROSSMAN: That's right, Your Honor.</p> <p>19 THE COURT: Is there any other defendant who wishes 20 to be heard on this issue at this point?</p> <p>21 (No response).</p> <p>22 So you are talking for all the defendants?</p> <p>23 MR. GROSSMAN: Yes, Your Honor.</p> <p>24 THE COURT: Thank you, very much. I will hear from 25 the plaintiffs. Can you hear on the phone?</p>
<p>Page 7</p> <p>1 their case from one in which they say that there is universal 2 reliance or presumed universal reliance by all smokers of 3 light cigarettes, purchasers of light cigarettes, in their 4 purchase to one which they say that the substantial majority 5 but not all relied and to base new damage models on that when 6 plaintiffs have made that change, they understand how 7 different the briefing is going to have to be. They 8 understand the new issues that arise from it. They understand 9 the new discovery that will arise from it. I presume they 10 don't -- it was not their expectation that they could file 11 what is now going to be at least 13 new expert reports, 12 including reports of nine entirely new experts, and not have 13 some discovery with regard to that. So, in view of all of 14 that, first thing that we would request of the Court is that 15 plaintiffs' new submissions which violate the case management 16 order which are inconsistent with the representations that the 17 plaintiffs made to the Court, which are directly inconsistent 18 with the plaintiffs' representations made to defendant, and 19 which were pulled on us by surprise only on the eve in essence 20 of the September 12th hearing on the motions that are briefed, 21 that all of those be stricken.</p> <p>22 I think it is the only appropriate relief we have. 23 We've briefed everything. We've taken the depositions of 24 virtually all of plaintiffs' 18 witnesses. There were a couple 25 of additional deposition extensions that are left hanging, but</p>	<p>Page 9</p> <p>1 MR. GROSSMAN: I can hear you, Your Honor, but I 2 couldn't hear.</p> <p>3 THE COURT: Why don't you come forward (indicating 4 to Mr. Hausfeld). Put the loudspeaker closer to counsel.</p> <p>5 Go ahead, please.</p> <p>6 MR. HAUSFELD: Thank you.</p> <p>7 Good morning, Your Honors.</p> <p>8 THE COURT: Can you hear now? Keep your voice up, 9 and put the loudspeaker right on the lectern.</p> <p>10 MR. GROSSMAN: Yes.</p> <p>11 MR. HAUSFELD: Although I don't like to begin 12 addressing the Court with a remark, I believe it is called 13 for. I would like to address the merits of defendants' 14 position and not what I believe is the offensive 15 characterization of the unprofessionalism of plaintiffs' 16 counsel.</p> <p>17 THE COURT: There is no reason why you shouldn't do 18 what you want to do, which is not to address what you think 19 are side issues.</p> <p>20 MR. HAUSFELD: This case comes before the Court in a 21 rather unique posture. To date, discovery is not closed, and 22 to date, there has been no answer to the amended complaint. So 23 the status of the pretrial proceeding is that reports were 24 submitted before the close of discovery and before the 25 defendants even committed officially to what their responses</p>

<p>1 would be to the claims and have not yet identified the 2 affirmative defenses. 3 With respect to class certification, we felt that 4 the matter had been sufficiently litigated and there was 5 sufficient material from which the Court could conclude one 6 way or the other whether or not there were common issues and 7 whether those common issues predominate. However, as the Court 8 noted, the law has moved somewhat and the Court now, unlike 9 the admonition in Eisen, needs to balance to some, import the 10 likelihood of the merits or the assessment of the merits of 11 the litigation. By definition that would require whatever is 12 done earlier to reflect what came later in the discovery 13 process. But more importantly, despite the fact that there was 14 a CMO entered, according to defendants' interpretation, the 15 Court then could not have asked the questions it did of both 16 parties and we could not have responded because that was an 17 item that was not in the case management order. All of the 18 objections that are presently being raised by the defendants 19 arise out of the plaintiffs' submission in response to the 20 Court's questions, the questions which were directed at both 21 parties, and to which the defendants said they will not 22 respond, they would only answer or reply to the answers of the 23 plaintiffs. So all of these experts that they're talking about 24 were attached to our response, the plaintiffs' response to 25 Your Honor's questions. None of those witnesses with the</p>	Page 10	Page 12
<p>1 exception of Dr. Hauser relate to the underlying substance of 2 the status of the motion for class certification. Professor 3 Tribe, for example, addresses the constitutionality of some of 4 the arguments raised by the defendants in response to your 5 question as to whether a case of this magnitude and nature is 6 impossible constitutionally to administer and manage, a 7 position that was taken by Professor Tribe months ago to which 8 defendants were fully apprised of and is not constituting a 9 new basis in support of class certification. 10 Wilkenfeld and Myers are being proffered in 11 response to the Court's questions as fact witnesses, not 12 experts. We have not added a new expert report for either 13 Mr. Myers or Ms. Wilkenfeld. The affidavits of Redfern and 14 Kinsella dealt with administration and notice, again, directly 15 in response to the Court's questions as to how plaintiffs 16 would foresee the case would be noticed if certification were 17 granted and administered -- if not only certification were 18 granted, but a judgment was entered or settlement was reached. 19 Slovic, Goldberg, Beyer and Cohen we've identified 20 as rebuttal reports, in rebuttal to the reports of defendants' 21 experts and if that is not permitted, then the Court can say 22 so, although it's, again, a bit odd where the defendants admit 23 there is no language in the case management order saying that 24 there shall be no rebuttal reports and it is an awkward 25 position where the plaintiffs bear the burden of proof to say</p>	Page 11	Page 13

<p>1 these things and we can still respond to oral argument. 2 MR. HAUSFELD: I still remember the ability to go 3 visit a friend who had a Winky set and you can make the 4 changes right on the screen and to which I responded you have 5 a screen, but basically essentially what defendants are saying 6 is for the presence of one report, Dr. Hauser's. They are 7 suddenly now ill prepared and being denied due process if they 8 are forced to proceed with this class certification hearing 9 and the hearing on the other Daubert motion and summary 10 judgment motions. In light of the context in which this case 11 comes before Your Honor that is somewhat disingenuous. What we 12 did is we took a look at what is before the Court and we have 13 16 plaintiffs' expert reports, 42 defendants' expert reports, 14 approximately over seven thousand pages of depositions, 15 thousands of pages of exhibits, against a further background 16 of the fact that there are hundreds of people who've 17 testified, both as witnesses in trials involving light 18 cigarettes, or at depositions in the Price matter, the Scott 19 matter, Blue Cross matter, the United States matter and 20 Schwartz matter, where there were tens of thousands of pages 21 of transcripts of the testimony or depositions and tens of 22 thousands of page of exhibits. 23 Your Honor has before you, we counted, twenty-two 24 motions by both sides involving those experts and those 25 parties, and yet, they claim that this one report of analyses</p>	<p>Page 14</p>	<p>1 tomorrow and could proceed on September 12th on that basis. 2 Prejudice to us would be if any of the new materials 3 filed by the plaintiffs were to be considered on that motion 4 and that's particularly true, of course, of Dr. Hauser who 5 constitutes, yet, a fifth alternate theory of damages that the 6 plaintiffs would be putting forth, but it is true of the other 7 experts as well. 8 Mat Myers and Ms. Wilkinson, for example, plaintiffs 9 are now claiming are not experts, but fact witnesses. Both 10 testify as to what they understand the FTC's requirements are. 11 We have put forth experts in this area and this is an area of 12 expert testimony. 13 THE COURT: I know it is difficult because you can't 14 see me but as to Hauser, you don't want him considered on the 15 September 12th argument, correct? 16 MR. GROSSMAN: That is correct. 17 MR. BERNICK: David Bernick. If I could be heard 18 for just a moment. 19 THE COURT: Yes, of course. 20 MR. BERNICK: Just to be clear, the question that 21 Your Honor has put to us on whether we are prepared to proceed 22 on the 12th of September, and also, in response to the 23 question that counsel from the plaintiffs posed, I want to be 24 clear for my client here, what we really want presently is one 25 thing as it applies to another. We already know what they</p>	<p>Page 16</p>
<p>1 or of a methodology which they themselves utilized and failed 2 to disclose now tips the scales to the point that they're 3 being allegedly denied due process if they proceed. 4 There's no reason to delay the hearing. 5 THE COURT: Are you prepared to go forward on 6 September 12th? 7 MR. HAUSFELD: Absolutely. 8 THE COURT: Okay. Thank you, very much. 9 MR. HAUSFELD: Thank you, Your Honor. 10 THE COURT: Do the defendants want to respond? 11 MR. GROSSMAN: Yes. It is Ted Grossman again. 12 Briefly, Your Honor, I am not sure that Mr. Hausfeld heard 13 what I had said because we are not claiming a due process 14 violation to proceed on the basis of the briefs as they are 15 submitted and on the experts who were identified on February 16 28th and March 28th. We are claiming that we were hoodwinked, 17 and that if the additional materials were considered, that it 18 would be very substantial prejudice to us, as plaintiffs have 19 anticipated in their entire process, but the current briefing 20 where the plaintiffs filed their motion for class 21 certification on February 28th, and where we responded on July 22 1st, and where plaintiffs reply brief is due tomorrow based 23 upon the experts who were first identified and the theories 24 that are contained first in plaintiffs' motion for class 25 certification are fully briefed or will be fully briefed as of</p>	<p>Page 15</p>	<p>1 are, but for the issues that Your Honor has to address, 2 fundamental issues about whether this case is viable, we want 3 those issues to be addressed by Your Honor under the basis of 4 a complete record where we have the full opportunity to 5 respond to their submissions and their theories. 6 THE COURT: I understand. 7 MR. BERNICK: That is our principal concern. What 8 we've essentially done, although it is not really framed this 9 way and that Mr. Grossman's points out, is that they have 10 sought to in a sense open the record further beyond what was 11 contemplated in the case management order before 12 September 12th or before these matters are heard by Your Honor 13 and without any showing of cause. 14 Typically, if you have a case management order it is 15 pretty much implicit in any case management order, they can 16 open on a showing of cause. They have made no showing of cause 17 and that is our principal problem, and it's really fairly 18 apparent. Myers and Wilkenfeld are both very well known to the 19 plaintiffs. Whether they are fact or expert witnesses, they 20 really are expert witnesses or purport to be. They are very 21 well known. Their matter will have been submitted in 22 connection with the other cases. There can't be any showing of 23 cause with respect to them. 24 THE COURT: Excuse me. 25 MR. BERNICK: Tribe is well known. Both have</p>	<p>Page 17</p>

1 testified. I am sorry. 2 THE COURT: Excuse me. 3 MR. BERNICK: I am sorry. 4 THE COURT: I hate to interrupt. I know it is 5 difficult without seeing each other and I appreciate that. I 6 am going to hear argument on September 12th of all pending 7 motions. I intend -- since I've done a good deal of reading of 8 enormous materials you've supplied and briefs you've supplied 9 and will supply in accordance with the order -- to decide that 10 motion based upon those materials and the briefs. 11 Now, with respect to other materials that are being 12 proffered, we'll go through them just to clarify the record, 13 but I expect them to be handled by the Magistrate Judge after 14 I hear the argument, so that I can hear the argument based on 15 the material that I have read in large part and that has been 16 fully briefed. 17 Now, with respect to the individual additional 18 pieces of evidence, I think for the edification of the 19 Magistrate Judge we ought to go through them piece by piece. 20 Hauser. His additional report will not be 21 considered on September 12th argument; is that clear? But it 22 is not precluded with respect to a trial, and the Magistrate 23 Judge may consider that after I have heard the argument and in 24 the course of making my decision. 25 Now, one of the reasons that I want to go forward on	Page 18	1 nature of legal briefs and some are in the nature of 2 scientific and factual predicates that have to be possibly 3 treated differently. 4 Do you understand what I'm saying? I'm looking over 5 at the plaintiffs' faces. They seem to be nodding. 6 MR. GROSSMAN: I would like clarification on a 7 couple of points and perhaps -- 8 THE COURT: Go ahead. 9 MR. GROSSMAN: Perhaps clarify it as we approach 10 one. I understand that we are going to be proceeding on the 11 basis of the plaintiffs' motion for class certification and 12 the defendants' opposition and the plaintiffs' reply, if they 13 file one, which is due tomorrow, and that the defendants' and 14 plaintiffs' reply brief due tomorrow will not be able to rely 15 upon the new submissions, except perhaps to the extent that we 16 discussed them today. 17 THE COURT: Excuse me. I assume as a practical 18 matter that their reply brief is practically locked in and I 19 am not going to require them to completely rewrite it, but if 20 there is any material in it that relates to new information I 21 am not going to consider. I just won't consider it. That's 22 all. I know what they have anyway. I have seen it all. I'm 23 telling you I'm going to decide September 12th based upon what 24 I have seen and what has been briefed. 25 MR. GROSSMAN: I would only suggest, Your Honor, in
1 September 12th, even though we've had to advance these dates 2 from time to time, is that almost certainly whatever I decide 3 on the basic certification motion will be taken to the Court 4 of Appeals for the Second Circuit. In the case of Simon, the 5 Court of Appeals waited almost two years before I received the 6 mandate just last week. I don't think it is fair to any of the 7 parties to keep putting off a decision on these fundamental 8 issues, whether they're stayed or not. Further proceedings 9 will depend first on what this Court does, and second, on what 10 the Court of Appeals does when a 23(f) application is made. 11 In general, based on my prior practice I do not 12 favor stays while 23(f) motions are before the Court of 13 Appeals but that's something that we will have to decide when 14 the matter comes up and it is something for the Court of 15 Appeals. 16 Even if the Court of Appeals doesn't stay on a 23(f) 17 motion, there will be some delay, probably some substantial 18 delay while the Court of Appeals decides whether it wants to 19 decide the certification issue as an interlocutory matter. 20 Since both sides have now told me that they're 21 prepared to go forward on September 12th and I am prepared to 22 go forward on September 12th, we will go forward on 23 September 12th based upon papers essentially submitted before 24 last week. But I want to go over these papers that you are 25 objecting to one at a time because some of them are in the	Page 19	1 that regard that if their reply brief contains additional 2 material beyond that which was contained in the experts' 3 report up through March 28th, that that could become a record 4 -- part of the record before the Court of Appeals on any 5 appeal from a decision on class certification. 6 THE COURT: Excuse me. 7 Well, you know more about appellate practice than I 8 do, but the whole record is in the court files and the Court 9 of Appeals will look at whatever it wants to look at. It's 10 always been my understanding that most appellate judges peek 11 at the full record before they make a decision, and sometimes 12 go beyond the record to take sub rosa judicial notice. So I'm 13 not concerned about protecting the Court of Appeals from 14 knowing too much. I'm telling you that I'm going to decide on 15 September 12th based on what you have relied on and what the 16 Magistrate Judge has told you since the matter will be before 17 the Court on September 12th. If you have any doubt about it, 18 you can take a copy of their brief and bracket it to show what 19 you want stricken and I'll take that motion on September 12th. 20 MR. GROSSMAN: All right. Your Honor. 21 THE COURT: I think it is unreasonable to ask them to 22 completely rewrite a brief that is probably being reproduced 23 right now. 24 MR. BERNICK: If Your Honor is going to decide the 25 matters that are now pending based upon the record without

<p>1 relying upon matters that we believe were not timely 2 submitted, what then is Judge Gold being asked to do with 3 respect to these witnesses and submissions? 4 THE COURT: He is being asked to consider them in 5 connection with the trial, should it go forward. If I grant 6 summary judgment to the defendants, that's the end of the 7 matter. There is nothing to consider. But if I allow the case 8 to proceed whether as a class action or in some other guise, 9 then the Magistrate Judge will have to decide how those 10 materials are to be dealt with. That's a different phase of 11 the litigation. 12 MR. BERNICK: I think I grasp that now, Your Honor, 13 and I guess maybe I should just be quiet and let Your Honor 14 ask the questions and have it play out but if, in fact, 15 Your Honor reaches the decision based upon the record as it 16 stands without reference to these materials but the materials 17 still constitute the ongoing record in the case for purposes 18 of trial, we essentially end up back in a position where, 19 number one, the record continues to evolve in the case, and 20 that record will, in fact, relate not only to the trial, but 21 also, to the same matters that Your Honor has addressed, even 22 though Your Honor has not made reference to them in reaching 23 the resolution that you have. 24 For example, if Your Honor were to determine that 25 the class would be certified on the basis of whatever it is</p>	<p>Page 22</p> <p>1 relied on. Beyond that, everything is going to go to the 2 Magistrate Judge who will continue through his control of 3 discovery, to shape the case for trial. If you have any 4 problem with the way he's handling it, you'll come back to me. 5 MR. BERNICK: I think that's clear. Can I at least 6 ask for Your Honor's patience after we go through the list to 7 come back with a procedural suggestion that Your Honor might 8 be prepared to listen to that further addresses this question 9 of how the record is evolving? I don't want to get in the way 10 of the list, but I do have a proposal that I think Your Honor 11 might find of value. 12 THE COURT: Yes, of course. I will be delighted to 13 hear anything you or any other litigant suggests, but I would 14 like to go through this list of what you're objecting to, so 15 we can make the record explicit, if you think that will be 16 helpful. 17 MR. GROSSMAN: That would be very helpful. I do have 18 one thought to add to what Mr. Bernick was saying a moment ago 19 and perhaps, if it is something that we can expand upon when 20 the list is done, but what we have already identified, I 21 identified in my letter to the Court, and I think the 22 plaintiffs have identified in their statement earlier today, a 23 crystal clear difference between the theory of the case and 24 theory of class certification that's embraced by the 25 plaintiffs' motion for class certification currently before</p> <p>Page 24</p>
<p>1 that Your Honor decides is the appropriate theory driving 2 class certification and without reference to the materials 3 that we take issue with, the case then goes forward, there is 4 no stay, and at that point the record becomes supplemented 5 with these additional materials. Effectively the appellate 6 review of your decision on September 12th will, you know, 7 will, in fact, be affected by the matters that subsequently 8 come before the Court, including the ones that we take issue 9 with. 10 THE COURT: I understand that problem. That is a 11 problem of the nature of federal litigation which is 12 essentially fluid right from the time that the complaint is 13 filed. Whether the Court of Appeals powers under 23(f) are 14 somewhat frustrated by subsequent rulings in connection with 15 preparation for trial and trial itself is an inherent problem 16 of our litigation practice as you well know. During the trial 17 itself I will be making rulings that may change considerably 18 the way the action goes forward under my general rule 15 19 powers and relation back. This procedure is a matter for the 20 Court of Appeals and Rule-Makers to determine. I am going to 21 go forward and decide on September 12th because there is a 22 shortness of life as Holmes has said, and as I am now very 23 much aware and we are not going to delay the litigation. 24 In fairness to you, we should decide the 25 September 12th motions based on the information that you</p>	<p>Page 23</p> <p>1 the Court, and the theory of class certification that the 2 plaintiffs would embrace on behalf of survey material that has 3 been done and of Dr. Hauser's report and testimony if that 4 were admitted. We have briefed the question of whether a class 5 can be certified where it is presumed that every purchaser of 6 cigarettes -- of light cigarettes purchased in reliance on a 7 purported fraud. 8 THE COURT: Excuse me. Stop. I am not going to make 9 any such presumption. That would be absurd. I think I've 10 indicated that in my earlier questions. I assume we have a 11 heterogeneous population with respect to these issues, that 12 has always been my assumption. It was clarified in every 13 single litigation involving tobacco that I'm aware of, 14 including those litigated before me. How that is dealt with 15 scientifically is an issue. To have this Court presume that 16 millions of people react in the same way like Pavlov's dogs is 17 not something that this Court has ever considered doing and I 18 think everybody understood that. 19 MR. GROSSMAN: Yes, Your Honor, I have understood 20 that, and I think the plaintiffs ultimately claim to 21 understand that perhaps in the past couple of weeks, but the 22 matter that is briefed before you is not based upon your 23 theory or my theory or anyone else's, other than the 24 plaintiffs which is universal reliance. Those are the papers. 25 THE COURT: Excuse me. I'll hear the argument on</p> <p>Page 25</p>

1 that on September 12th. 2 MR. GROSSMAN: Okay. 3 THE COURT: I am not going to consider Hauser's new 4 material. 5 MR. GROSSMAN: All right. 6 THE COURT: On September 12th, after I make my 7 decision, should I allow the case to go forward towards a 8 trial, the Magistrate Judge will decide that; is that true? 9 MAGISTRATE JUDGE GOLD: Certainly. 10 THE COURT: You heard him. What's the next one 11 after Hauser? 12 MR. GROSSMAN: The second matter that I wanted to 13 raise is related not to the argument on September 12th or on 14 the motion, but rather, on the responses to Your Honor's 15 questions that were posed on June 6th. 16 THE COURT: Excuse me. I want to know what materials 17 you do not wish me to look at on the September 12th motion. 18 MR. GROSSMAN: All right. 19 THE COURT: Can we deal with that problem so we can 20 have a clear record? 21 MR. GROSSMAN: Yes, Your Honor. 22 THE COURT: Please proceed. Next. 23 MR. GROSSMAN: Wilkenfeld. 24 THE COURT: What's he going to say that you object 25 to?	Page 26	1 can be notified. 2 MR. GROSSMAN: All right. 3 THE COURT: No for Kinsella. Next. 4 MR. GROSSMAN: The next is Richard Redfern. He 5 would offer opinions on the manageability of a payout scheme. 6 THE COURT: Of what? 7 MR. GROSSMAN: How a payout scheme to the plaintiffs 8 in the event that they could be manageably handled. 9 THE COURT: I know how it is going to be handled if 10 they win. I don't need her to tell me. You know, I can tell 11 you how it is going to be probably handled right now. If they 12 get a large damage verdict it will be allocated based on how 13 many cigarettes individual members of the class purchased 14 during the period. The amount they'll get will be the amount 15 of value difference if that should ever be determined. That's 16 the way it's going to be handled. I'll say that in discussing 17 the class certification issue. It will be based on a simple 18 smoker's affidavit. I'm not going to spend a lifetime or the 19 lifetime of my successor, should there be a damage verdict and 20 judgment, in handing out money. 21 What is the next thing? I don't need her. 22 MR. GROSSMAN: Dr. Paul Slovic, a psychologist. 23 THE COURT: How do you spell his last name? 24 MR. GROSSMAN: S-L-O-V-I-C. He's a psychologist 25 whose testimony is in some ways duplicative and in some ways	Page 28
1 MR. GROSSMAN: She. 2 THE COURT: She I mean. 3 MR. GROSSMAN: She is a new expert that purports to 4 identify what the defendants could have done within the 5 bracket of the FTC standards. 6 THE COURT: No, she's not going to be considered on 7 September 12th. Next. 8 MR. GROSSMAN: Next is the plaintiffs' expert 9 Mat Myers who also would purports to testify with regard to 10 the FTC's rule-making and the defendants' obligations under 11 that rule-making. 12 THE COURT: No. 13 MR. GROSSMAN: Next is Larry Tribe. Professor Tribe 14 would testify as to standards for class certification and as 15 to whether -- 16 THE COURT: No. Wilkenfeld, Myers and Tribe don't 17 tell me anything that is not already in my library. Although, 18 I have great admiration for them I have all that material in 19 my head or in the library and they're not people that are 20 going to be helpful as witnesses. 21 Next. 22 MR. GROSSMAN: Next, Your Honor, would be Catherine 23 Kinsella would offer opinions on ways that the class could be 24 notified. 25 THE COURT: I don't need her. I know how the class	Page 27	1 in conflict of the testimony of plaintiffs' other expert. 2 THE COURT: What is he going to say? 3 MR. GROSSMAN: He is going to say that he has 4 studied the psychology of how people make decisions and how he 5 believes they make decisions based on feelings rather than 6 rational thoughts in many ways. 7 THE COURT: I know that is the fact. How did we 8 choose our wives or husbands? Not on any factual survey. I 9 mean that is the way you make all important decisions, and 10 right from the outset of courses in law school we know there 11 is a difference between the purely intellectual activity and 12 the decision-making activity which is quite distinct. I don't 13 need Slovic on this. Next. 14 MR. GROSSMAN: Then, Your Honor, the plaintiffs have 15 stated in their letter to you yesterday that they were 16 planning to submit but have not yet submitted additional 17 reports by Doctors Cohen, Goldberg, Press, and Beyer. 18 THE COURT: Cohen how do you spell that? 19 MR. GROSSMAN: C-O-H-E-N. 20 THE COURT: Yes. The next one is? 21 MR. GROSSMAN: Goldberg. 22 THE COURT: Yes. 23 MR. GROSSMAN: The next one is P-R-E-S-S, and then 24 B-E-Y-E-R. 25 THE COURT: Yes.	Page 29

<p>1 MR. GROSSMAN: We have not yet even seen -- all of 2 those have additional reports, all of those have been 3 submitted in the past, and that is earlier reports were 4 submitted in the past and we don't even have the reports. 5 THE COURT: I'm not going to consider them on the 6 September 12th submission. All of those the Magistrate Judge 7 can deal with. He may have a different view than I do with 8 respect to rule 401 and rule 403 and rule 702, but for 9 purposes of September 12th, I'm not going to consider them. I 10 have boxes of materials already, much of which I've gone 11 through. What is the next one? 12 MR. GROSSMAN: I believe those are all of the 13 experts who have been identified recently. If I've not named 14 anyone, perhaps one of the other defendants could name, if 15 there is anyone else. 16 THE COURT: Is there anyone else, other defendants? 17 MR. BERNICK: I think that is it. 18 THE COURT: All right. Now, the plaintiff is rising 19 and wishes to be heard. 20 MR. HAUSFELD: I would like to correct the record 21 that with regard to experts Slovic, Presser, Goldberg and 22 Cohen, they directly respond to the criticism of defendants' 23 expert Stewart. If the Court is not going to consider them, 24 essentially it is depriving us of the ability of having those 25 experts point out what in defendant Stewart's criticism is in</p>	<p>Page 30 1 consider the merits on a certification motion. The issue on a 2 certification motion does not require a definitive final 3 decision on the merits. In fact, it is probable that it 4 requires somewhat less, so you have three burden stages: 5 certification, summary judgment and trial. I don't find that I 6 need these issues argued back and forth the way it would be 7 before a jury. Do you, Magistrate Judge Gold? 8 MAGISTRATE JUDGE GOLD: No. 9 THE COURT: Do you agree with me? 10 Magistrate JUDGE GOLD: Yes. 11 MR. GROSSMAN: Your Honor raises another point. We 12 have currently pending on September 12th not only the motion 13 for class certification but five defense motions for summary 14 judgment and six plaintiffs' motion for summary judgment. 15 THE COURT: I have enough material to decide them. I 16 have looked at the materials. 17 MR. GROSSMAN: When Your Honor speaks of a three 18 part procedure, I just want to know for our own planning, are 19 you planning to hear the summary judgment motion together with 20 the motion for class certification? 21 THE COURT: I am. 22 MR. GROSSMAN: Okay. 23 THE COURT: Although you have not briefed it and it 24 is an interesting question, the question of burdens of proof 25 and their levels at those three stages are something that I</p>
<p>1 their judgment incorrect. 2 THE COURT: Are you going to challenge their experts 3 in the Daubert hearing? 4 MR. HAUSFELD: Yes. 5 THE COURT: Well, you will cross-examine them and I 6 will consider it. 7 MR. HAUSFELD: And the same goes -- 8 THE COURT: But I don't want these additional experts 9 at this time. I don't have the time to read more materials in 10 preparation for September 12th and I want the record frozen 11 for purposes of all of those motions. That doesn't mean I'm 12 not going to think of everything I know about cigarette cases 13 and the law generally. That would be absurd, but I don't want 14 any of this new material considered on September 12th. 15 MR. HAUSFELD: With respect to Dr. Beyer, all he was 16 doing was responding to the criticism levied against his 17 report, and I understand Your Honor, but I just wanted to make 18 the record clear that all of those reports were directed 19 principally at responding to criticisms raised by the defense. 20 THE COURT: I understand that and there's a 21 difference between a certification and a summary judgment 22 motion and a certification and a summary judgment motion and a 23 trial. I have indicated that I don't agree with the Second 24 Circuit's position, which is outmoded and its hasn't had a 25 chance to reverse yet, that the district court doesn't</p>	<p>Page 31 Page 33 1 assume you are going to argue, and I don't need additional 2 experts to tell me about that. That's normal lawyer's talk, 3 don't you agree? 4 MR. GROSSMAN: I agree that is normal lawyer's talk, 5 yes. 6 MR. BERNICK: Would it be appropriate for me to, 7 with some trepidation, venture my idea? 8 THE COURT: You decide whether you want to venture. I 9 will hear whatever you want to tell me. 10 MR. BERNICK: I have already made that decision. My 11 only concern was whether this is the appropriate time. 12 THE COURT: It is always appropriate for you to say 13 anything that you think will help me. 14 MR. BERNICK: Well, when I venture it, let me say, 15 first of all, that I understand fully Your Honor's concern 16 over time, although it is my observation you're proceeding 17 very promptly here. We also have a concern with time because 18 if, in fact, this matter does go forward to trial, we are very 19 mindful of Your Honor's desire to do that promptly, and we are 20 then concerned about the time that is going to be necessary to 21 deal with any further additions to the record in this case, 22 which then brings me to Magistrate Judge Gold. I know from 23 many years of experience, Magistrate Judge Gold will keep us 24 on whatever schedule Your Honor deems to be appropriate, with 25 skill and deliberation, and that is really what leads to my</p>

1 proposal, which is the way perhaps of Your Honor giving a 2 little bit of a guidance to that process, and it is this, we, 3 too, would like to have the record frozen as, obviously, we 4 have argued at some length here there was a case management 5 order . 6 THE COURT: Go forward. 7 MR. BERNICK: Our concern is that we are still 8 facing a moving target. We can, obviously, name our arguments 9 well with respect to Myers and Wilkenfeld, whether they should 10 be added or not. With respect to the Tribe record in the case, 11 Redfern and Kinsella, again, they are what they are. We 12 understand that. Hauser and Slovic appeared previously. 13 Hauser has got something new, but they're already there. Our 14 real concern is that we want to get the record closed. We want 15 to get it closed not only for purposes of Your Honor's 16 consideration, for matters that are up for decision on 17 September 12th, but for all purposes in the case so that we 18 don't have the continuing -- I won't say slippage but kind of 19 evolution of a record not due simply to Your Honor's 20 deliberation about how the case should proceed but due in case 21 to the plaintiffs' desire to continue to pursue new 22 alternative theories when whatever theories they have for 23 trial purposes should be committed to, so that we have an 24 opportunity to adequately -- opportunity at pretrial to deal 25 with them. So I guess that is a long round about way of	Page 34 1 to depose those new experts would have an opportunity to 2 submit their own experts. 3 MR. BERNICK: I assume that -- 4 THE COURT: Well, I understand the problem, and as I 5 said, it is inherent in these cases. We have to move forward. 6 Drafters of the rules of civil procedure recognized the 7 problem. They wanted cases decided as best they can be decided 8 on the merits. I think it was Rule one. They also wanted the 9 litigation to go forward swiftly and as inexpensively as 10 possible. The Magistrate Judge will proceed with the case. If 11 you have any problems, you can take an appeal from his 12 decisions. We will all do whatever we can to reduce the costs 13 and times involved while at the same time getting fair results 14 on the merits to both defendants and plaintiffs. Is there 15 anything else anybody wishes to say? 16 MR. GROSSMAN: Only one further thing, Your Honor, 17 rather than going back over what we've already discussed, in 18 addition to the new expert reports that the plaintiffs have 19 provided, the plaintiffs have now given us a 40 some-odd page 20 single spaced response to Your Honor's questions that were 21 posed in the June 6th memorandum. When we were last before the 22 Court on July 26th, we had a discussion of the timing with 23 regard to the response by the parties to that June 6th 24 memorandum, and Your Honor said that in view of the summer it 25 would be all right for the plaintiffs to take until
Page 35 1 saying there has already been further efforts to supplement. 2 We will take those up with Magistrate Judge Gold, whether they 3 are appropriate or not, but we should have an end to this 4 effort to continue to add to the record new theories, new 5 ideas, new experts and frankly, new work. It creates a 6 tremendous amount of work and tremendous amount of uncertainty 7 even as Your Honor is pressing very actively to advance this 8 case toward resolution. So we would ask that Your Honor 9 provide by way of guidance to Magistrate Judge Gold that to 10 the extent that the expert records already have been 11 submitted, those are issues to be well framed and argued 12 before Magistrate Judge Gold about whether that material 13 should be considered for trial purposes or not. But with 14 respect to matters that have not even resulted in a report at 15 this point in time, we would ask that Your Honor simply say 16 enough is enough, no more reports, we are going to work with 17 whatever it is that is in the record now. Magistrate Judge 18 Gold can take up the question about whether it should stay in 19 the record, but let's have an end now to this continued stream 20 of new people and new reports. We can't prepare for trial on 21 that basis. It is just not fair and it is not possible. 22 MR. GROSSMAN: I would add, Your Honor, if I may, 23 that, obviously, if Magistrate Judge Gold allows any of the 24 plaintiffs' new experts' reports to be considered for purposes 25 of trial, that defendants in addition to having an opportunity	Page 35 1 essentially today to respond to the June 6th memorandum and 2 that Your Honor understood that the defendants in accordance 3 with your professional responsibilities, as you put it, might 4 well need more than until September 12th to respond to the 5 memorandum to the plaintiffs' response. We will need in 6 accordance with our own professional responsibilities more 7 time for responding to that particular piece. We would ask 8 that we respond on the first Monday in October. I believe 9 that's the 2nd or 3rd. 10 THE COURT: Yes, that's okay. I don't -- having read 11 the plaintiffs' response which I found very interesting and 12 useful -- I don't conceive that any of those answers will 13 control the decisions on the September 12th motions. But 14 that's for argument on the 12th without that memorandum being 15 considered. So you can take your time. A lot of those answers 16 will affect the way the trial preparation and trial goes 17 forward. 18 The only difficult problem posed is the collateral 19 estoppel problem, as I recall now, among those issues which 20 might make a difference on certification. 21 MR. GROSSMAN: Yes. 22 THE COURT: But I have tentatively decided not to 23 apply collateral estoppel even though an argument can be made 24 based on the Illinois case and possibly what will come down 25 from the Washington, D.C. case in view of the very extensive

1 cigarette litigation, much of which has been won by the
2 defendants and because the material supporting other judgments
3 will possibly need to come before the jury as evidence in
4 connection with possible damages anyway. So I don't believe
5 I'm going to find favorably to the plaintiffs on that issue.
6 But we can discuss that further without extended discussion
7 now, unless you would like to.

8 MR. GROSSMAN: No, Your Honor. I appreciate the
9 additional time for that briefing.

10 THE COURT: All right. Is there anything else the
11 plaintiffs would like to add?

12 MR. HAUSFELD: Other than to wish everyone a good
13 Labor Day holiday.

14 THE COURT: Plaintiffs in accordance with their
15 usual genial nature wish everybody a good holiday and the
16 defendants respond in kind as does the Court.

17 Again, thank you, and have a lovely late summer
18 holiday.

19 MR. GROSSMAN: Thank you, and thank you, again, for
20 your courtesy and response to the letter on such short notice.

21 THE COURT: All right. The hearing is closed.
22 (Proceedings adjourned as above set forth)

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